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Supreme Court of the United States

OCTOBER TERM, 1958

No. 174

UNITED STATES OF AMERICA, PETITIONER,

vs.

EMBASSY RESTAURANT, INC., ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

Supreme Court of the United States

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vs.

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COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. A] IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter
of

EMBASSY RESTAURANT, INC.,
Debtor-Appellee,
UNITED STATES OF AMERICA,
Claimant-Appellant.

.. (File Endorsement Omitted)

[fol. 1]

APPENDIX TO APPELLANT'S BRIEF—filed October 11, 1957

IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

D. C. 117-A

BANKRUPTCY DOCKET

Chapter XI

Title of Case

Cause No. 24636

In the Matter of

EMBASSY RESTAURANT, INC.,

Debtor

1418 Spruce Street, Phila. Pa.

(Assigned to Welsh, J.)

*Referee and Trustee.**Referee:* Thomas J. Curtin*Trustee:* Stanley W. Root, Morton Q. Klein &
John J. Ryan*Cash Received and Disbursed*

<i>Date</i>	<i>Name</i>	<i>Received</i>	<i>Disbursed</i>
3-1-56	Deposit	45.00	
Mar. 2, 1956	To U. S. Treas.		40.00
10-9-56	E. F.	30.10	
Oct. 10, 1956	To U. S. Treas.		30.10
12-17-56	E. F.	22.90	
Dec. 18, 1956	To U. S. Treas.		22.90
12-21-56	S. F.	134.00	
12-21-56	E. F.	149.25	
Dec. 24, 1956	To U. S. Treas.		283.25
5-14-57	E. F.	12.30	
May 15, 1957	To U. S. Treas.		12.30
5-16-57	E. F.	10.00	
May 17, 1957	To U. S. Treas.		10.00
5-23-57	S. F.	53.47	
5-23-57	E. F.	54.97	
May 23, 1957	To U. S. Treas.		108.44

Attorneys

Dennis, Cohen & Dennis, Esqs., for Debtor

*Date**Proceedings*

1956

- 1 Mar. 1 Debtor's Petition for an Arrangement under Chapter XI, List of Creditors, and Affidavit for an Order extending time for filing Schedules, etc. filed.
- 2 Mar. 1 Petition for an Order appointing Stanley Root, Sr., Esq., and Morton Q. Klein, Receivers, with leave to operate the business for a period of 60 days, filed. Bond \$5000.
- 3 Mar. 1 Order of Reference to Thomas J. Curtin, Esq., Referee, filed.

[fol. 2]

*Proceedings**Date*

1956

- Mar. 6 Bond of Stanley W. Root and Morton Q. Klein, Receivers, in \$5000., with New Amsterdam Casualty Co., as surety, approved and filed.
- 4 Mar. 7 Petition for an Order appointing appraisers filed.
- 5 Mar. 7 Petition for an Order appointing Miller, Adelman & Lavine, Esqs., as attorneys for receivers, filed.
- 6 Mar. 8 Affidavit of Mailing Notices filed.
- 7 Mar. 8 Order confirming appointment of receivers filed.
- 8 Mar. 21 Schedules and Statement of Affairs filed.
- 9 Mar. 26 Report of Appraisers filed (to referee 3/27/56).
- 10 June 13 U. S. Tax Claim filed.
- 11 Sept. 20 Copy of petition of receivers to show cause why debtor corporation should not be adjudged a bankrupt and Order to show cause thereon returnable 10/9/56 received from referee and filed.
- 12 Oct. 9 Order adjudging debtor a bankrupt and directing that bankruptcy be proceeded with received from referee and filed.
- 13 Oct. 9 Copy of Petition and Order granting leave to receivers to sell assets at public sale and to employ an auctioneer received from referee and filed.
- Oct. 17 Bond of Stanley W. Root, Morton Q. Klein & John J. Ryan, Trustees, in \$15,000., with New Amsterdam Casualty Co., as surety, approved and filed.

[fol. 3]

Proceedings

1957

- 14 May 21 Certificate for Review sur denial of priority status to proofs of claim filed.

Date
1957

- Jun. 10 Argued sur certificate for review CAV
15 Jun. 28 Opinion, Welsh, J., vacating order of referee denying priority claims of Trustee of the Welfare Fund of Local Union 111 filed.
16 July 9 Order reversing order of referee denying the priority claims of the trustee of the Welfare Fund of Local Union 111 etc. filed. 7/10/57 noted and notice mailed.
17 " 15 Notice of Appeal by United States filed copy to R. H. Markowitz, Esq. and Nathan I Miller, Esq., 7/16/57).
18 " 15 Copy of Clerk's notice to U. S. Court of Appeals filed.
Aug. 5 Record transmitted to U. S. Court of Appeals.
19 " 9 Stipulation of Counsel that certain agreements be included in the record of this case and Order of Court approving same, filed.
" 12 Supplemental record transmitted to U. S. Court of Appeals.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 4] IN THE UNITED STATES DISTRICT COURT

AGREEMENT DATED MARCH 21, 1951

A G R E E M E N T

THIS AGREEMENT, made and entered into on this 21st day of March, 1951, by and between Embassy Club, 1418 Spruce Street, Phila., hereinafter designated as "EMPLOYER," successors and assigns, and the Local Joint Executive Board of Philadelphia, hereinafter known as the "Union", consisting of the respective Local Unions Nos. 111, 115, 138, 170, 232, 301, 434, 568, affiliated with the Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America of the American Federation of Labor.

WITNESSETH:

1. In consideration of the Mutual promises hereinafter named, the parties hereto agree as follows:

ARTICLE I. Recognition.

Section 1. Employer recognizes the Union as the sole and exclusive collective bargaining representative of the employees working in the establishment now operated and maintained by the Employer or in any establishment hereafter operated and maintained by the Employer, in all matters relating to collective bargaining such as wages, hours of work, working conditions, adjustment of grievances, etc. The designated representatives of the Union shall constitute the Union representatives in all negotiations as to all matters of collective bargaining which shall be conducted. All clauses shall apply to all the employers' successors and assignees.

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[fol. 5]

ARTICLE X. Vacations.

Section 1. Each employee shall be entitled to one (1) day of vacation with pay for each two (2) months of unbroken employment. Unbroken employment is hereby defined as all time during which an employee shall retain seniority in the establishment or with the Employer under the terms of this contract. Proved illness or excused absence as provided for in the Seniority provisions shall not be construed as a break in employment. Said vacation to be taken between June 15 and September 15, the total time not to exceed two (2) weeks. Vacation periods may not be split into separate groups of days except at the specific request of the employee concerned. Any local union which has been receiving better vacation arrangements shall not receive any reduction of such benefits because of this clause. All vacation pay shall be paid at the time the employees take their vacation.

Employees with Five (5) years of service shall receive three (3) weeks vacation with pay. It is optional on the part of the employee to take the third week vacation or the extra week pay for the same.

Section 2. In the event that the Employer sells, closes his business because of business failure or discontinues the establishment prior to the time the employees take their vacations, then such Employer shall pay to each employee the vacation money which has accrued as of the time that

the Employer sells or discontinues the establishment. If the employer fails to pay the vacation pay within fifteen (15) days after the purchaser takes over the establishment, then the purchaser shall be liable for the vacation pay.

[fol. 6] Section 3. The vacation period shall be between June 15th and September 15th). This period of June 15th to September 15th is adopted so as not to interfere with operation; however, it is not to be used for purpose of computing length of service but merely to denote the period of vacation time and further, in the event that an employee leaves employment prior to the vacation period, then such employee shall receive his or her accrued vacation grant.

Section 4. Seniority shall be followed in honoring the requests of the employees as to their vacation time.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year aforementioned.

s/ SAMUEL SELBER (SEAL)

s/ VICTOR CIVATTE
For Local

111

s/ JOSEPH KIRK
For Local

115

s/ HARRY DAVIS
For Local

301

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO AGREEMENT DATED MARCH 21, 1951

S U P P L E M E N T

The Employer agrees to contribute to the Local 301 Welfare Trust Fund, the sum of One Dollar and Twenty-five Cents (\$1.25) per week per each Employee payable monthly at Five Dollars and Forty Cents (\$5.40) for the [fol. 7] welfare and insurance of said Employees, members of Local 301, in the employ of the Employer.

Upon the adoption of the Welfare Plan Article X of the Agreement pertaining to sick leave shall become ineffective insofar as Waiters and Waitresses Union, Local 301 is concerned.

The above mentioned Welfare Plan shall become effective September 1, 1951, on which date the Employer shall make his first monthly contribution of Five Dollars and Forty Cents (\$5.40) per each Employee, members of Local #301, to the Union's Welfare Trust Fund.

FOR THE EMPLOYER

/s/ SAMUEL SELBER

FOR THE UNION

/s/ HARRY DAVIS Local 301

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO AGREEMENT DATED MARCH 21, 1951

SUPPLEMENT TO ARTICLE X

LOCAL 111 WELFARE TRUST FUND

The Employer agrees to contribute to the Chefs, Cooks, Pastry Cooks and Assistant Union Local 111 Welfare Trust Fund the sum of \$1.50 per Week per each Employee, payable \$6.50 Monthly for the Welfare and Insurance for the members of Local 111 and in the employ of the Employer for the Welfare Plan.

Upon the adoption of the Welfare Trust Fund Article X of the agreement pertaining to sick leave shall become [fol. 8] ineffective insofar as the Chefs, Cooks, Pastry Cooks and Assistant Union is concerned.

The above mentioned Welfare Plan shall become effective as of September 1, 1951. The Employer shall make his first Monthly contribution of \$6.50 on August 1, 1951, per each Employee, members of Local 111 to the Union's Trust Fund.

Employer /s/ SAMUEL SELBER

Union /s/ VICTOR CIVATTE

IN UNITED STATES DISTRICT COURT**SUPPLEMENT TO AGREEMENT DATED MARCH 21, 1951****SUPPLEMENT TO ARTICLE X—WELFARE PLAN**

A. The employer agrees to contribute to the Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111, Welfare Plan Trust Fund, the sum of \$7.00 each month for each member of Local 111 in his employ. January 1, 1953

B. The employer agrees to contribute to the Bartenders' Welfare Trust Estate Fund, the sum of two dollars and fifty cents (\$2.50) per week for each full time Bartender in his employ and at the rate of 5% of the per diem wage for each part time bartender in his employ. January 1, 1953

C. The employer agrees to contribute to the Local 301 Welfare Trust Fund, the sum of \$5.40 per month for each employee member of Local 301 in his employ.

D. This said fund shall be maintained and utilized to promote Life Insurance, Weekly Sick Benefits, Hospital and Surgical Benefits and other benefits for the employees [fol. 9] who are members of Locals 111, 115, and 301 in the employ of the employer.

E. Upon the adoption of the Welfare Plan, Article X of the agreement pertaining to sick leave shall become ineffective in so far as the three Local Unions who are a party of this contract concerned.

For the employer s/ SAMUEL SELBER

Local 111 s/ VICTOR P. CIVATTE

Local 115 s/ JOSEPH KIRK

Local 301 s/ RAY TURCHI

IN UNITED STATES DISTRICT COURT
AGREEMENT AND DECLARATION OF TRUST, DATED
DECEMBER 13, 1951

AGREEMENT AND DECLARATION OF TRUST

WHEREAS, as of December 13, 1951 there was established the **CHEFS, COOKS, PASTRY COOKS, AND ASSISTANTS UNION, LOCAL 111—WELFARE PLAN**, hereinafter referred to as "**Local 111, Welfare Plan**", which Local 111, Welfare Plan has continued in existence since that date and is still in existence; and

WHEREAS, the Local 111, Welfare Plan has been operated and administered since its inception by a Board of Trustees, the members of which Board of Trustees being designated by the Executive Board of Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111, and

WHEREAS, the members of the Board of Trustees, in their operation and administration of the Local 111, Welfare Plan have at all times adhered to and acted in the manner required of Trustees in operating and administering trust funds for the benefit of the employees for which Employers have contributed payments into the Local 111, Welfare Plan, and

WHEREAS, Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111, hereinafter referred to as the Union, and the Board of Trustees now desire to formalize and set forth in writing the verbal agreements and understandings between them, which verbal agreements and understandings have governed the operation and administration of the Local 111, Welfare Plan by the Board of Trustees.

NOW, THEREFORE, the Union and the members of the Board of Trustees, who presently are Victor P. Civatte, John Fer.... and Herbert Rach, and their successors, hereby execute this formal, written Agreement and Declaration of Trust which shall govern the administration and operation of the Local 111, Welfare Plan by the present members of the Board of Trustees and their successors.

ARTICLE I

DEFINITIONS

Section 1. The "Local 111, Welfare Plan" shall consist of all Policies, together with dividends, refunds or other sums payable to the Trustees on account of such Policies, all investments made and held by the Trustees, all monies received by the Trustees by way of Employer contributions or as income from investments made and held by the Trustees or otherwise, and money properly received and held by the Trustees for uses, purposes and trusts set forth in this Agreement and Declaration of Trust.

[fol. 11] *Section 2.* "Employers" means and includes each Employer and all Employers paying or contributing into the Local 111, Welfare Plan, as such payments or contributions are required by a collective bargaining Agreement or Agreements entered into or to be entered into by and between the Employer and Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111, referred to as Union.

Section 3. "Union" means Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111 of the Hotel and Restaurant Employees and Bartenders International Union.

Section 4. "Board of Trustees" or "Board" or "Trustees" shall consist of those persons designated by the Executive Board of the Union to hold in trust and, as Trustees, to operate and administer the Local 111, Welfare Plan. Since the Employers, who are obligated and required to make the payments or contributions into the Local 111, Welfare Plan are not engaged in interstate commerce within the meaning and definition of the National Labor Relations Act, as amended, it does not appear to be legally required that there be joint administration of the Local 111, Welfare Plan; therefore, unless and until it be otherwise legally required, the Trustees shall continue to be solely designated by the Executive Board of the Union.

Section 5. "Employee" shall mean any employee in the employ of an Employer who, as an Employee, shall be included, now and/or in the future, in the collective bargaining unit represented by the Union. Employee shall also mean Employees employed by the Union.

Section 6. "Contributions" or "Payments" shall mean the money paid into the Union 111, Welfare Plan by the Employers and by the Union.

[fol. 12]

ARTICLE II

NAME AND PURPOSE

Section 1. There is established a trust fund to be known as the Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111—Welfare Plan.

Section 2. The purpose of the Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111—Welfare Plan shall be to provide welfare benefits for Employees who meet the eligibility requirements for coverage as such eligibility requirements presently exist or are amended.

ARTICLE III

NUMBER OF TRUSTEES, DESIGNATION, REMOVAL, SUCCESSOR TRUSTEES, MEETINGS OF TRUSTEES

Section 1. The Local 111, Welfare Plan shall be administered and operated by a Board of Trustees. The Board of Trustees shall consist of three (3) persons who shall be designated by the Executive Board of the Union. The Trustees must be members in good standing of the Union in order to be designated and to continue to serve as Trustees.

Section 2(a). If a Trustee chooses to resign, he must give thirty (30) days prior written notice in writing to the remaining Trustees of his desire to resign as a Trustee. Such notice shall set forth the date on which the Trustee wishes his resignation to become effective; however, in no event shall the effective date of the resignation be less than thirty (30) days from the date that the notice or resignation is sent to the Board of Trustees unless the remaining Trustees unanimously agree to allow the effective date of the resignation to be on a date less than thirty (30) days from the date on which the resignation was sent.

Section 2(b). In case any of the Trustees shall die, become incapable of acting hereunder, resign or be removed, a successor Trustee shall be immediately appointed by the Executive Board of the Union.

Section 3. Each Trustee shall have one (1) vote. A quorum of the Board of Trustees shall consist of at least two (2) Trustees; when a quorum is present at any meeting, the Trustees present and voting shall decide any questions and matters brought before such meeting and the action of a quorum of the Board of Trustees shall be valid and binding as the action of the Board of Trustees.

Section 4. Any successor Trustee shall, immediately, upon appointment as a successor Trustee, and upon acceptance of the Trusteeship in writing, become vested with all the property, rights, power and duties of a Trustee hereunder, and notice of the appointment of the successor Trustee or Trustees shall be given to all of the other Trustees, to any bank or banks used as a depository for the Local 111, Welfare Plan, as well as any other institution or person holding any of the property and assets of the Local 111, Welfare Plan.

Section 5. The Trustees shall have a regular meeting of the Board of Trustees at least once each every three (3) month period of the year. The chairman of the Board of Trustees, who shall be designated by the members of the Board of Trustees, may call a meeting of the Trustees at [fol. 14] any time by giving at least seven (7) days' notice of the date, time and place thereof to the remaining Trustees. Any two (2) of the Trustees may call a meeting of the Board of Trustees by giving at least ten (10) days' notice of the date, time and place to the remaining Trustees. Meetings of the Board of Trustees may also be held at any time without any notice if all of the Trustees consent thereto. If the circumstances require it, then action may be taken by the Trustees without a meeting; provided, however, that in such case there shall be a unanimous written consensus by all of the Trustees then in office.

Section 6. Any Trustee may, by power of attorney or other written authorization, empower the other Trustees to act on his behalf and to use his name for the execution or signature of any document for the purpose of these presents and of the trust hereby executed without being responsible or liable for any loss in connection therewith as to his responsibility as hereinafter set forth.

ARTICLE IV

POWERS AND DUTIES OF TRUSTEES

Section 1. In operating and administering the Local 111, Welfare Plan, the Trustees shall have the power and/or duty:

(a). To establish the policy and rules pursuant to which the Local 111, Welfare Plan is to be administered and operated.

(b). In connection with the administration and operation of the Local 111, Welfare Plan and in order to effect [fol. 15] tuate the purpose for the establishment of the Local 111, Welfare Plan, as such purpose is described in Article II, Section 2 above; to formulate and establish the conditions of eligibility for coverage.

(c). To formulate provisions for the payments of benefits and to formulate all other provisions including all details pertaining to insurance policies, which may be required as necessary to carry out the purposes for the establishment of the Local 111, Welfare Plan, as such purposes are described in Article II, Section 2 above.

(d). To receive and collect all contributions or payments due to and payable to the Local 111, Welfare Plan. In so doing, the Trustees, in their sole discretion, shall have the right to maintain any and all actions for legal proceedings necessary for the collection of the Employer's contributions or payments as such contributions or payments are provided for or required; at present, subject to amendment by later collective bargaining agreement, each Employer is required to pay or contribute into the Local 111, Welfare Plan the sum of eight (\$8.00) Dollars per month for every employee within the collective bargaining unit represented by the Union. The Trustees, shall have the right to prosecute, defend, compound, compromise, settle, abandon or adjust, by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, details and things relating to the Local 111, Welfare Plan.

(e). To verify the accuracy of statements and information submitted by the Employers and Employees on contribution forms, claim forms, and other forms. In furtherance of this right and duty, the Trustees may require the

[fol. 16] Employers to furnish to the Trustees such information and reports as they, the Trustees, may require in the performance of their work as Trustees and the Employers shall furnish such information and reports when required to do so by the Trustees.

(f). To invest and reinvest the principal and income of the Local 111, Welfare Plan and to keep the same invested without distinction between principal and income provided, however, that investments and reinvestments may be made only in accordance with the applicable law, if any, relating therein. If deemed advisable by the Trustees, they may retain an investment agent or advisor, whether it be a bank or trust company or a corporation or an individual, to counsel and advise the Trustees in all matters relating to investments and reinvestments. The Trustees shall have the right to reserve and keep unproductive of income such monies of the Local 111, Welfare Plan as the Trustees may determine to be advisable without liability for interest on such amounts.

(g). To sell, exchange, convey, transfer or dispose of, and also credit options with respect to any property, whether real or personal, at any time held by the Local 111, Welfare Plan. Any sale may be made by contract or by auction and no persons dealing with the Trustees shall be required to see to the application of the money or to inquire into the validity, expediency, or propriety of such sale or other disposal. Also, to retain, manage, operate, repair, improve and mortgage for any period any real estate held by the Trustees. Also, to make, effectuate and deliver any and all deeds, assignments, documents of [fol. 17] transfer, and any other instruments that may be necessary or appropriate to carry out the powers herein granted.

(h). To erase any investment of the Local 111, Welfare Plan whether it be in the form of securities or other property, to be registered in, or to be sent in the name of the Trustees or the name of any of the Trustees, or to retain such investment unregistered or in such form permitting transfer by delivery, but the books and records of the Trustees shall at all times show that all such investments are part of and belong to the Local 111, Welfare Plan; to vote in person or by proxy, or otherwise, on any secur-

ities held by the Trustees and to exercise by attorney or in any other manner, any of the rights of whatsoever nature pertaining to securities or any other property held by the Trustees at any time; to consent to the recapitalization, consolidation, sale, merger, dissolution or readjustment of any corporation, company or association which has issued the securities held by and belonging to the Local 111, Welfare Plan; to exercise any option or options, make any agreement or subscription, pay any expenses, in connection with the securities and to hold and retain any property acquired by means of the exercising of the powers hereinbefore expressed to the extent that the Trustees, in their discretion, deem it acceptable.

(i). To pay and provide for the payment of all reasonable and necessary expenses of collecting the Employer contributions or payments; to pay and provide for the payment of all expenses which may be incurred in connection with the establishment and operation of the Local 111, Welfare Plan, such as expenses for the employment of ad-[fol. 18] ministrative, legal, expert and clerical assistance, the purchase or lease of premises to be used and occupied by the Local 111, Welfare Plan, the purchase or lease of such materials, supplies, and equipment, as the Trustees, in their discretion, find necessary to appropriate in the exercising of their rights and duties as Trustees.

(j). To deposit all funds received by the Local 111, Welfare Plan in such bank or banks as the Trustees may designate for that purpose, provided, however, that the depository bank or banks shall be members of and insured by the Federal Deposit Insurance Corporation. The withdrawing of funds from the designated depository bank or banks shall be made only by check signed by Trustees, or several of them, or person or persons as authorized by the Board of Trustees to sign and countersign checks.

(k). To keep true and accurate books of account and records of all of the transactions of the Local 111, Welfare Plan and to have an audit made of all books and accounts by a certified public accountant at least annually, which report, in writing, of the certified public accountant shall be made available to the Employer and to the Union and also placed in the office where the business of the Local 111, Welfare Plan is transacted.

(l). To determine from time to time whether and to what extent and at what times and places and under what conditions and regulations, the books of the Trustees shall be open for inspection and no Employer or member of the Union shall have any right to inspect any book or document of the Trustees except as authorized by resolution of the Trustees or except in accordance with such conditions and [fol. 19] regulations, if any, as may be so prescribed from time to time by the Trustees. Also, to issue such financial statements or other reports as they, the Trustees, may deem proper and to determine at what time such statements shall be issued and the method of distribution.

(m). To borrow money with or without security, on such terms as the Trustees, in their discretion may deem desirable, and for such sums borrowed to issue notes, bonds or other obligations therefor, and/or to pledge the property of the Local 111, Welfare Plan or any part thereof.

(n). To delegate any of the powers and duties of the Trustees to any agent or employee engaged by them or to any one or more of the Trustees themselves.

(o). To make, adopt, amend or repeal by-laws, rules and regulations not inconsistent with the terms of this Agreement and Declaration of Trust, as the Trustees may deem necessary or desirable for the conduct of their business and the government of themselves, their officers, agents, and other representatives; to amend the Local 111, Welfare Plan provided that the amendments comply with the purpose hereof and further provided that any amendments to the Local 111, Welfare Plan shall be signed by the Trustees as part of the records and meeting of the Trustees and a copy of all shall be sent to the Employer and the Union.

(p). To require, in the discretion of the Trustees, an Employer to post a surety bond to insure the payment of the required contributions or payment into the Local 111, Welfare Plan if the Employer is in default in making the required contributions or payments into the Local 111, [fol. 20] Welfare Plan. The form and amount of the surety bond shall be prescribed by the Trustees. In lieu of such surety bond, an Employer, hereinbefore described, may post cash or a certified check with the Trustees in

the same amount as above set forth in lieu of which cash or a certified check is being posted. The surety bond or, in lieu thereof, the cash or certified check posted, shall be held by the Trustees so that they will be able to collect therefrom the amount due to the Local 111, Welfare Plan, and, if that event occurs, the Employer shall be required to reestablish the surety bond or cash or certified check in the same amount that was set before such collection out of such surety bond, cash or certified check was made, or in a revised amount. The Trustees shall decide for how long the surety bond, cash or certified check shall remain posted by the Employer. This right to require an employer to post a surety bond or cash or certified check in lieu thereof, shall be a right available to the Trustees, in addition to the right available to the Union, to request the Employees to refuse to work for that Employer.

(q). To appoint, if the Trustees deem it advisable, a bank trust insurance company, or other financial institution as Corporate Trustee and to enter into and execute a Trust Agreement with said Corporate Trustee, which Trust Agreement shall contain provisions therein for the proper management of the Local 111, Welfare Plan; upon the execution of such Trust Agreement, the Trustees may convey and transfer to the Corporate Trustee such part of the Local 111, Welfare Plan as may, in the sole discretion of the Trustees, be proper and advisable. There shall be no limit with respect to the powers which the Trustees may [fol. 21] grant to the Corporate Trustee in such Agreement, provided, however, that the funds of the Local 111, Welfare Plan may be invested and reinvested only in accordance with the applicable law, if any relating thereto. Instead of designating a Corporate Trustee for the purpose hereinbefore described, the Trustees may, in their discretion, retain an investment advisor or agent, as hereinbefore described in Article IV, Section 1(f), as to all matters relating to investments and reinvestments.

(r). To construe the forms and provisions of this Agreement and Declaration of Trust, the Local 111, Welfare Plan, and all other supplementary and amendatory documents, and the construction adopted by the Trustees in good faith shall be binding upon the Employer, the

Union, the Employees, any beneficiaries, and all other persons who may be involved or affected.

(s). To perform and do any and all such actions and things that may be properly incidental to the exercising of the powers, rights, duties and responsibilities of the Trustees.

ARTICLE V

LIABILITY OF TRUSTEES, INDEMNIFICATION OF TRUSTEES, TRUSTEES REIMBURSEMENT FOR EXPENSES, NOTICE TO OTHER PERSONS REGARDING THEIR DEALINGS WITH TRUSTEES.

Section 1. A Trustee or the Trustees shall be protected in asking in good faith upon any paper or document believed by the Trustee or Trustees, to be genuine and believed to have been made, executed and delivered by the [fol. 22] parties purporting to have made, executed or delivered the same, and the Trustee or Trustees shall be protected in relying and acting to the administration or operation of the Local 111, Welfare Plan. So long as the Trustee or Trustees commit no act of wilful misconduct, bad faith, or gross negligence, the Trustee or Trustees shall not be held personally answerable or personally liable for either (1) any liability or debts contracted by them as Trustees, or for the non-fulfillment of contracts or, (2) for any error of judgment or for any loss arising out of any act or omission in the execution of the Trust, or (3) for the actions or omissions, whether or not performed at the request of the Trustee, of any other Trustee or of any Employee, agent, or attorney elected or appointed by or working for the Trustees.

Section 2. The Trustees shall not be liable for the proper application of any part of the Local 111, Welfare Plan or for any other liability arising in connection with the administration or operation of the Local 111 Welfare Plan except as herein provided for.

Section 3. The Trustees may from time to time consult with legal counsel for the Local 111, Welfare Plan and shall be fully protected in acting and relying upon the advice of such legal counsel.

Section 4. The Trustees may seek protection by any act or proceeding that they may deem necessary in order to settle their accounts; the Trustees may obtain a judicial termination or declaratory judgment as to any question of construction of the Agreement and Declaration of Trust or as to any act thereunder.

[fol. 23] *Section 5.* A Trustee or Trustees may require the other Trustees as well as the Executive Board and Union to execute a release after an audit of the Local 111, Welfare Plan by a certified public accountant discloses that all affairs are in proper order thus entitling the Trustees to a release in favor of each Trustee, his heirs, executors, administrators and assigns.

Section 6. The cost and expense of any action, suit or proceeding brought by or against the Trustees or any of them, which costs and expenses shall include counsel fees, shall be paid from the Local 111, Welfare Plan except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such Trustee was acting in bad faith or was grossly negligent or was guilty of wilful misconduct in the performance of such Trustees' duties:

Section 7. Trustees shall not be bound by any notice, declaration, regulations, advice or requests unless and until it shall have been received by the Trustees at the principal place of the business of the Local 111, Welfare Plan located in Philadelphia, Pennsylvania.

Section 8. No person, partnership, corporation, or association dealing with the Trustees shall be obligated to see as to the application of any funds or property of the Local 111, Welfare Plan or to see that the terms of the Local 111, Welfare Plan have been complied with or be obligated to inquire into the necessity or expediency of any act of the Trustees and every instrument effected by the Trustees shall be conclusive in favor of any person, partnership, corporation or association relying thereon that: (a) [fol. 24] at the time this delivery of said instrument the trust was in full force and effect and that the (b) said instrument was effected in accordance with the terms and conditions of this Agreement and Declaration of Trust; and (c) the Trustee was duly authorized to execute such instrument.

Section 9. The Trustees shall receive no compensation for their services, but shall be reimbursed for all reasonable and necessary expenses that they incur in the performance of their duties. However, a Trustee or Trustees may be compensated if specially designated by the Board of Trustees to perform work of an administrative nature for the Local 111, Welfare Plan.

Section 10. The Trustees and all Employees of the Local 111, Welfare Plan shall be bonded by a duly authorized surety company in an amount of Ten Thousand (\$10,000.00) Dollars for each Trustee and employee of the Local 111, Welfare Plan. The cost of the premium of each bond shall be paid out of the Local 111, Welfare Plan.

ARTICLE VI

CONTRIBUTIONS OR PAYMENTS TO THE PENSION FUND; DEFAULT BY EMPLOYER OR OTHER EMPLOYERS.

Section 1. The contributions or payments of the Employers shall be made in the amount set forth in the collective bargaining Agreement or Agreements and amendment or amendments thereto presently in existence or to be hereafter in existence by and between the Union and the Employers. At present the contributions or payments by the Employers into the Local 111, Welfare Plan is Eight (\$8.00) Dollars per month for each employee within [fol. 25] the collective bargaining unit represented by the Union. The Employers' contribution or payments are due into the Local 111, Welfare Plan by the first day of the month following the end of the month in which the employees have worked; for example, payments or contributions are due on the first of February for the month of January and on the first days of each succeeding month thereafter for the work performed during the preceding month. All contributions or payments shall be forwarded to the offices of the Union which are presently located at 1207 Walnut Street, Philadelphia, Pennsylvania. The Union's contributions or payments into the Local 111, Welfare Plan for its employees shall be in the amount of Eight (\$8.00) Dollars per month for each covered Union employee and such payments shall be made on the first day of the month for the preceding month's work.

Section 2. The Trustees may compel and enforce the payment of the contributions in any manner which they may deem proper; however, the Trustees shall not be required to compel and enforce the payments of the contributions or payments or else to be personally or collectively responsible therefor if, in the opinion of the Trustees, the enforcement of the payment or contributions would involve an expense greater to the Local 111, Welfare Plan than the amount to be gotten from any effort to compel or enforce the payment of the contributions or payments.

Section 3. The Trustees shall have the right, in their discretion, to endeavor to secure payment for all expenses incurred by the Trustees if the Trustees are forced to incur an expense in bringing suit or in undertaking arbitration proceedings against a defaulting Employer.

[fol. 26] *Section 4.* The Trustees shall have the right, in their discretion to request an Employer to furnish to the Trustees all wage records relating to such Employer's employees along with the payments due and the Trustees shall have the right to seek the aid of the Union in securing such wage records from an Employer.

Section 5. The Trustees shall also have the right, in their discretion, to request that the Union proceed against the defaulting Employer in any legal and proper manner available to the Union in order to require or compel an Employer to adhere to the collective bargaining Agreement or amendment thereto by which the Employer has undertaken the obligation to make the required contributions or payments.

ARTICLE VII

EMPLOYEES' RIGHTS.

Section 1. No Employee nor any person claiming by or through any Employee by reason of having been named a beneficiary in any certificate or insurance or otherwise nor any Employer nor the Union nor any other person, partnership, corporation, or association shall have any right, title or interest in or to the Local 111, Welfare Plan or any part thereof. Title to all of the money, property and income paid into or acquired by or accrued to the Local 111, Welfare Plan shall be vested in and remain exclusive-

ly in the Board of Trustees of the Local 111, Welfare Plan and it is the intention of the parties hereto that said Local 111, Welfare Plan shall constitute an irrevocable trust and that no benefits or monies payable from the Local 111, [fol. 27] Welfare Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The monies to be paid into the said Local 111, Welfare Plan shall not constitute or be deemed monies due to the individual Employees nor shall said monies in any manner be liable for or subject to the debts, contracts, liabilities, or torts of the parties entitled to such money upon the termination of the Local 111, Welfare Plan.

Section 2. In view of the manner in which the liability to make contributions or payments has been imposed upon the Employers arising out of collective bargaining, the Trustees shall have the right, in their discretion, to file claims in any proceedings in which an insolvent Employer is involved; the Trustees shall endeavor to have such claims considered and declared to be priority claims entitled to ~~payment~~ preference.

ARTICLE VIII

AMENDMENTS; LIQUIDATION OF WELFARE TRUST FUND AND ~~CATERING~~ WELFARE FUND.

Section 1. The provisions of this Agreement and Declaration of Trust may be amended by an instrument in writing executed by and between the Trustees and the Union; provided, however, that no investment shall divert the assets of the Local 111, Welfare Plan from the purposes of these trusts as such purposes are described in Article II, Section 2 above.

[fol. 28] *Section 2.* This Agreement and Declaration of Trust and the Trusts herein referred to shall not be eliminated except upon sixty (60) days prior written notice being given by either the Union to the Trustees or by the Trustees to the Union; if parties of termination be given, then the Local 111, Welfare Plan shall be applied and

disbursed by the Trustees so as to (a) pay any and all outstanding debts and obligations of the Local 111, Welfare Plan and, then (b) to apply any remaining surplus in a manner best thus to effectuate the purpose set forth in Article II, Section 2 above, and then, upon the disbursement of all of the funds in the Local 111, Welfare Plan, this Agreement and Declaration of Trust shall terminate. However, if, prior to the disbursement of the funds in the Local 111, Welfare Plan a new Agreement and Declaration of Trust is entered into by and between the Union and the Trustees, then the Local 111, Welfare Plan shall become reactivated and there shall be no further action taken toward termination, but thereafter all disbursements from the Local 111, Welfare Plan shall be made only as provided for in this Agreement and Declaration of Trust and as it may be amended.

ARTICLE IX

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. The provisions of this Agreement and Declaration of Trust shall be liberally construed in order to promote and effectuate the establishment and operation [fol. 29] of the Local 111, Welfare Plan herein mentioned. The Trustees shall have power to interpret, apply and construe the provisions of this Agreement and Declaration of Trust and Local 111, Welfare Plan and any construction, interpretation and application adopted by the Trustees in good faith shall be binding upon the Union, the Employer, as well as upon the Employees, beneficiaries, and all other persons who may be involved or affected.

Section 3. In the event that any provisions of this Agreement and Declaration of Trust shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining provisions of this Agreement and Declaration of Trust; the provision or provisions held illegal or invalid shall be fully severable and the Agreement and Declaration of Trust shall be constructed and enforced as if said illegal or invalid provisions had never been inserted herein.

Section 4. This Local 111, Welfare Plan is accepted by the Trustees in the Commonwealth of Pennsylvania, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the Commonwealth of Pennsylvania.

Section 5. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine gender in all situations where they would so apply, and wherever any words are used in this Agreement and Declaration of Trust in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and wherever any words are used in this Agreement and [fol. 30] Declaration of Trust in the plural form, they shall be construed as though they were also used in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, the undersigned, by their duly authorized proper officers, do hereunto set their hands and seals as of the date first above mentioned.

Board of Trustees

*Chefs, Cooks Pastry Cooks, and
Assistants Union, Local 111*

The undersigned Trustees, by their execution of this Agreement and Declaration of Trust, do hereby accept the trusteeship and declare that they will receive and hold the Local 111, Welfare Plan as Trustees by virtue of this Agreement and Declaration of Trust for the uses, purposes and trust herein set forth and with the powers and duties herein set forth and none others.

[fol. 31]

IN THE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA—○—
[Title omitted]


LIEN CLAIM OF UNITED STATES—dated June 12, 1956

In Arrangement Chapter XI
Claim of the United States for Taxes
Lien ClaimState of Pennsylvania, } ss.:
County of Philadelphia. }

IRA HIRSCHBERG, Chief, Special Procedures Section, Collection Division, Office of the District Director of Internal Revenue, Philadelphia, a duly authorized Agent for the United States in this behalf, being duly sworn, deposes and says:

1. That EMBASSY RESTAURANT INC., above named is justly and truly indebted to the United States in the sum of \$25,102.64, with interest thereon as hereinafter stated.

2. That the nature of the said debt is Internal Revenue Taxes due pursuant to Law as follows:



[fol. 32]

Nature of Tax and Statute Involved	Year or Taxable Period Ended	Amount of Tax	With interest at the Rate of 6% per annum Interest Began	Lien Date
INTERNAL REV- ENUE CODE OF 1939 Chapt. 9	Sections 1622 and 1400-10 2nd Qtr. 1954	* 1,092.21	3/2/56	8/13/54
	Accrd. int. to 3/1/56	317.89		
Sub-Chapts. D&A	" penalty	186.65		
Withholding and Fed. Ins. Contrib.	4th Qtr. 1954	3,910.10	—	2/23/55
OF 1954	Sections 3402 and 3101-3111			
Chapts. 24&21	1st Qtr. 1955	* 3,955.20	3/2/56	5/31/55
	Accrd. int. to 3/1/56	160.96		
Withholding and Fed. Ins. Contrib.	2nd Qtr. 1955	* 2,996.35	"	8/15/55
	Accrd. int. to 3/1/56	95.41		
	3rd Qtr. 1955	* 1,741.31	"	11/23/55
	Accrd. int. to 3/1/56	25.99		
	4th Qtr. 1955	2,402.62	—	2/23/56
	1st " 1956	1,640.38	—	"
OF 1939 Chapt. 10	Section 1700 E 4th Qtr. 1953	* 3,370.82	3/2/56	4/9/54
	Accrd. int. to 3/1/56	373.79		
Sub-Chapt. A	" penalty	168.54		
Cabaret Tax				
OF 1954	Section 4231-32			
	2nd Qtr. 1955	631.70	—	8/23/55
Chapt. 33	4th " "	1,743.60	—	2/15/56
Sub-Chapt. A	Accrd. int. to 3/1/56	284.12		
Cabaret Tax				
		<u>\$25,097.64</u>		
	Lien Fees	5.00		
		<u>\$25,102.64</u>		

NOTE: *-Denotes Liens filed of Record Lien #26922 filed 3/7/55 and Lien #28150 filed 1/5/56 in the office of the Prothonotary Phila. County Court, City Hall, Philadelphia, Pennsylvania, as well as other Liens indicated in last column and claimed as a Lien priority. Interest continues to accrue on Liened Items to date of payment.

3. That no part of said debt has been paid, but that the same is now due and payable at the Office of the District Director of Internal Revenue at Philadelphia.

4. That there are no set-offs or counterclaims to said debt:

[fol. 33] 5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the United States Revised Statutes, or other applicable provisions of Law. Attention is also called to the provisions of Section 3467 of the United States Revised Statutes, with respect to the personal liability of every Executor, Administrator, Assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 12 day of June, 1956.

IRA HIRSCHBERG, /s/
*Chief, Special Procedure Section,
 Office of the District Director of
 Internal Revenue—Philadelphia.*

*Duly sworn to by Ira Hirschberg
 jurat omitted in printing
 (all in italics)*

[fol. 34] IN UNITED STATES DISTRICT COURT
 AGREEMENT DATED JULY 1, 1956

A G R E E M E N T

THIS AGREEMENT, made and entered into on this 1st day of July, 1956, by and between the GREATER PHILADELPHIA RESTAURANT OPERATORS, INC. (hereinafter designated as "CORPORATION"), acting for itself and on behalf of the corporation, partnerships

and individuals listed herein (hereinafter designated as "EMPLOYERS"), and the LOCAL JOINT EXECUTIVE BOARD OF PHILADELPHIA (hereinafter designated as "UNION"), consisting of the respective Local Unions No. 111, 115, 232 and 301, and affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union, American Federation of Labor.

W I T N E S S E T H :

1. In consideration of mutual promises hereinafter named, the parties hereto agree as follows:

ARTICLE I. Recognition

Section 1. CORPORATION recognizes the UNION as the sole and exclusive collective bargaining representative of the employes, in the classifications set forth in the individual Schedule "A" hereto attached, working in each establishment now operated and maintained by any of the EMPLOYERS or in any establishment hereafter operated and maintained by any of the EMPLOYERS, in all matters relating to collective bargaining such as wages, hours of work, working conditions and adjustment of grievances. The designated representatives of the UNION and its affiliates Local Unions No. 111, 115, 232 and 301 shall constitute the UNION representatives and the CORPORATION shall constitute the EMPLOYERS representative in all negotiations as to all matters of collective bargaining which shall be conducted. All clauses shall apply to each of the EMPLOYERS' successors and assignees. This agreement shall be applicable to any other Employer who may become a member of the CORPORATION after the date of this agreement and a copy of whose approved application for membership in CORPORATION SHALL be filed with UNION by CORPORATION; provided, however, that such member shall have first agreed with UNION on the wage scale for the employes of such members, and provided that the then existing contract of such Employer shall have expired.

ARTICLE X. Sick Leave

(It is expressly agreed that this ARTICLE X shall be operative only in the event the Welfare Plans as hereinafter provided shall not be in effect.)

Absence due to illness shall be paid for at the normal rate of pay provided, however, that pay for such absence due to illness shall not exceed 7 days per year.

If an employe shall not receive any sick leave or shall not receive the full sick leave to which such employe is entitled during the year, such sick leave shall accumulate; provided, however, that sick leave shall not accumulate for a period in excess of twenty-one days of payable sick leave.

Any employe employed for less than 90 days shall not be entitled to sick leave; provided, however, at the completion of 90 days of employment an employe shall be entitled to sick leave as herein above set forth and shall be paid for such sick leave in the following manner.

[fol. 36] At the time such employe returns to work, the employe shall receive one day's sick leave pay for each two months of service from the date of original employment and the balance due to such employe shall thereafter be paid to him at the rate of one day's sick leave pay for each subsequent two months of employment.

• • • • •

ARTICLE XXI. Welfare Plans

A. Each Employer agrees to contribute:

- (a) to the Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111, Welfare Plan Trust Fund, the sum of Eight Dollars (\$8.00) each month for each full-time employe member of Local 111 in his employ.
- (b) to the Bartenders' Welfare Trust Estate Fund, the sum of Two Dollars and fifty cents (\$2.50) per week for each full time bartender in his employ at the rate of five per cent (5%) of the per diem wage for each part-time bartender in his employ.

- (c) to the Local 301 Welfare Trust Fund, the sum of Eight Dollars (\$8.00) per month, for each steady employe member of Local 301 in his employ. However, in no event will more than Eight Dollars (\$8.00) per month be paid for any particular employe during any one month.
- (d) to the Counter Workers Local 232 Health and Welfare Trust Fund, the sum of Five Dollars (\$5.00) per week for each full-time employe member of Local 232 in his employ, and the sum of Two Dollars and fifty cents (\$2.50) per week for each part-time employe member of Local 232 in his employ.

[fol. 37] B. These funds shall be maintained and utilized to promote Life Insurance, Weekly Sick Benefits, Hospital and Surgical Benefits and other benefits for the employes who are members of Locals 111, 115, 232 and 301 in the employ of the Employer, as in past practice.

C. Should the Employer fail to make the agreed upon contribution to the Insurance Fund, he shall be personally liable for all payments and expenses incurred by employes due to accidents and illnesses, which payments and expenses would have been covered by and paid for by the insurance agreement set forth above.

D. Welfare payments are due and payable the first business day of the month for the then current month.

• • • •

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year aforementioned.

GREATER PHILADELPHIA RESTAURANT
OPERATORS. INC.

THOMAS ROBERTS s/ (SEAL)
President

MRS. MATILDA LOCKMAN s/ (SEAL)
Secretary

FOR THE LOCAL JOINT EXECUTIVE
BOARD

WILLIAM J. BRENNAN s/
President

I. HERMAN STERN s/
Sec'y.-Treas.

[fol. 38] Attest:

JOHN M. TAXIN s/

Witness:

BERT ROSS s/

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

REFEREE'S CERTIFICATE FOR REVIEW SUR
DENIAL OF PRIORITY STATUS TO PROOFS
OF CLAIMS—May 21, 1957

To the Honorable, the Judges of Said Court:

I, Thomas J. Curtin, Referee in Bankruptcy, to whom the above matter was referred, respectfully certify:

STATEMENT OF THE CASE

The claimants, Harry Davis and Victor Civatte, filed proofs of claim in the amounts of \$216.00 and \$336.00 respectively, claiming priority as wage claimants for monies due to their respective Welfare Trust Fund or Plan, in accordance with collective bargaining agreements between Locals 111 and 301 with the bankrupt, Embassy Restaurant, Inc.

[fol. 39] At a hearing held before the Referee on May 7th, 1957, the Referee denied these two claims the status of a priority wage claimant, but allowed the two claims as general unsecured claims.

DISCUSSION

The form of the collective bargaining agreement was not annexed to the proof of claim in this case, so that the Referee is compelled to look to the proofs of claim.

Both proofs are practically identical, showing they were based upon

(A) contributions to the said Welfare Trust Fund due and owing in accordance with the provisions of the collective bargaining agreement accruing within a period of three months prior to bankruptcy. The employer agrees to contribute to the Local Welfare Trust Fund the sum of \$8.00 per month for each employee member of Local 301 in his employ.

(B) contributions due in accordance with the attached provisions of the collective bargaining agreement (A) the employer agrees to contribute to the Cooks, etc. Local 111 Welfare Plan Trust Fund the sum of \$8.00 per month per each member of Local 111 in his employ.

The identical question posed here was before the 2nd Circuit in a recent case, Local 140 Security Fund v. Hack, No. 24113, decided March 4, 1957, opinion by J. Leibell.

At one point this case states—Other collective bargaining agreements, such as the case at bar, provide only for a payment by the employer to the Welfare Fund, with no assignment, or deduction from the workman's wage—

[fol. 40] The Court refused the claim of priority, holding that the bargaining agreement created only a debtor

and creditor obligation between the employer and third parties, for something other than wages.

The Referee is in accord with this opinion and denies the claimant's priority as a wage claimant.

CONCLUSIONS OF LAW.

1. The claimants are denied the status of priority wage claimants under Section 64-(a) 2 of the Bankruptcy Act.

2. The claimants are allowed the status of general unsecured creditors in the amounts of \$216.00 and \$336.00 respectively.

In accordance with the said petition for review, I transmit herewith the following record to your Honorable Court:

1. Proof of claim (19) of Harry Davis.
2. Proof of claim (20) of Victor P. Civatte.
3. Petition for Review.
4. Testimony (May 7th, 1957).

Respectfully submitted,

THOMAS J. CURTIN,
Referee.

May 21st, 1957.

[fol. 41] IN UNITED STATES DISTRICT COURT

OPINION—June 28, 1957

WELSH, J.

This case is before the Court on a petition for review of the disallowance by the Referee in Bankruptcy of certain priority wage claims filed on behalf of the employees of the Bankrupt by the Trustee of the Employees' Welfare of Local Union 111 and by the Trustee of the Employees' Welfare Fund of Local Union 301.

On May 21, 1951, Embassy Restaurant, Inc., entered into a collective bargaining agreement with Local Unions 111 and 301, recognizing said Unions as the sole and exclusive bargaining representatives of the employees in all negotiations as to all matters of collective bargaining thereafter to be conducted. Said agreement contained provisions relating to hours, wages, vacations, holidays, seniority and other conditions of employment. Another provision of said agreement related to sick leave with pay for seven days each year which could be accumulated if not used to a maximum of twenty-one days.

In a supplemental agreement, dated January 1, 1953, the Employer and Local Unions agreed to make the provision in the agreement pertaining to sick leave ineffective. In its stead the Employer agreed to contribute certain sums for each employee to a Welfare Plan, the funds to be maintained and utilized to promote life insurance, weekly sick benefits, hospital and surgical benefits and other benefits for the employees.

Subsequently, on July 1, 1956, a collective bargaining agreement was entered into between Greater Philadelphia Restaurant Operators, Inc., acting on behalf of Embassy [fol. 42] Restaurant, Inc., and other restaurants, and Local Unions 111 and 301 which provided for contributions to the Welfare Trust Funds of Local Unions 111 and 301.

The foregoing provisions were in effect at the time of the instant bankruptcy.

The Welfare Plans are administered pursuant to a formal written agreement and declaration of trust. Each trust provides that employee shall mean any employee in

the collective bargaining unit represented by the Union; and provides further that the purpose of the Welfare Plan shall be to provide welfare benefits for employees. The collective bargaining agreement provides that each employer is required to pay the sum of \$8.00 per month for every employee within the collective bargaining unit represented by the Union. In view of the manner in which the liability to make contributions or payments has been imposed upon the employers arising out of collective bargaining the Trustee of the Welfare Fund has the right in his discretion to file claims in any proceedings in which an insolvent employer is involved; and said Trustee shall endeavor to have such claims considered and declared to be priority claims entitled to payment preference. Finally, it is provided that all questions pertaining to the Trust's validity, construction and administration shall be determined in accordance with the laws of the Commonwealth of Pennsylvania.

Subsequent to the Employer's being adjudged a Bankrupt the Trustee of the Welfare Fund of Local Union 111 filed his proof of claim, as did the Trustee of the Welfare Fund for Local Union 301, seeking the status of a priority wage claimant, pursuant to the provisions of Section 64(a)(2) of the Bankruptcy Act, 11 U.S.C. Section 104 [fol. 43] (a)(2), for payments to the Welfare Funds in the amounts of \$216.00 and \$336.00 which had accrued in the three month period prior to the Bankruptcy. The Referee denied the priority claims asserted but allowed the Trustees of the Welfare Funds the status of general unsecured creditors in the amounts of \$216.00 and \$336.00 respectively. The instant petition for review thereupon followed.

1. Section 64(a) of the Act provides that: "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, * * * shall be * * * (2) wages not to exceed \$600.00 to each claimant, which have been earned within three months before the date of the commencement of the proceedings, due to workmen * * *"

It is observed that contributions due the Welfare Funds from the Bankrupt Employer in this proceeding do "not

* * * exceed \$600.00 to each claimant", by reason of the amount the Employer was obliged to pay monthly for each employee; and "have been earned within three months before the date of the commencement of the proceeding". Also, it is undisputed that the employees, whose numbers within the collective bargaining units represented by the respective Unions determined the amount of the unpaid contributions for which wage priorities are claimed, were "workmen" within the meaning of 64(a)(2).

2. Thus, the sole remaining question is: "Are the unpaid contributions from the Bankrupt Employer to the Welfare Funds under the collective bargaining agreement 'Wages' which are due to workmen and therefore entitled to priority within the meaning of Section 64(a)(2)?"

3. The precise question has not been decided by this Circuit. Cases outside this Circuit concerned with the [fol. 44] problem are in conflict. While it is true those cases are not binding on us we have examined them none the less and consider the case of *In Re Otto*, 146 Fed. Supp. 787, most persuasive. In that case the opinion of Judge Mathes, which contains an exhaustive review of the problem and which we think is well reasoned, holds that the unpaid contributions of the employer to the Welfare Fund constitute wage claims entitled to priority under Section 64(a)(2). Its language we deem particularly applicable here; however, to quote it here we feel would serve no useful purpose. Suffice it to say that we approve of it most fully.

4. The question here posed is, therefore, answered in the affirmative.

In accordance with the foregoing opinion the Order of the Referee denying the priority claims of the Trustee of the Welfare Fund of Local Union 111 and the Trustee of the Welfare Fund of Local Union 301 will be vacated.

An appropriate order will be prepared and submitted.

IN UNITED STATES DISTRICT COURT

ORDER REVERSING ORDER OF REFEREE, ETC.—July 5, 1957

AND NOW, TO WIT this 5th day of July, 1957, it is hereby ordered and decreed as follows:

1. The Order of the Referee in Bankruptcy denying the priority claims of the Trustee of the Welfare Fund of Local Union 111 and the Trustee of the Welfare Fund of Local Union 301 is hereby reversed and vacated.

2. The Referee in Bankruptcy is ordered to treat the claims of the Trustee of the Welfare Fund of Local Union 111 and the Trustee of the Welfare Fund of Local Union 301 as priority claims for "wages" within the meaning [fol. 45] of Section 64(a)(2) of the Bankruptcy Act, 11 U. S. C. Section 104(a)(2).

/s/ GEO. G. WELSH.

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed: August 9, 1957

It is hereby stipulated and agreed by and between the parties to this action, Harold K. Wood, United States Attorney in and for the Eastern District of Pennsylvania, Louis C. Bechtle, Assistant United States Attorney for said District, attorneys for the claimant, United States of America, and Wilderman and Markowitz, Esquires, attorneys for the union, that there shall be included in the Court record of the above entitled bankruptcy matter the following written agreements for the reason that the Opinion handed down by The Honorable George A. Welsh on June 28, 1957 indicates by specific reference that these contracts formed an essential basis of His Honor's Opinion and subsequent Order:

1. Agreement dated July 1, 1956 between the Greater Philadelphia Restaurant Operators, Inc. and the Local Joint Executive Board of Philadelphia consisting of the respective Local Unions, numbered 111, 115, 232, and 301, and affiliated with the Hotel and Restaurant Employees

and Bartenders International Union, American Federation of Labor.

2. Agreement dated March 21, 1951 between the Embassy Club, 1418 Spruce Street, consisting of the respective Local Unions, numbered 111, 115, 232, 301, 138, 170, 434, [fol. 46] 568, 677 and 758 affiliated with the Hotel and Restaurant Employees International Alliance and Bartenders International League of America of the American Federation of Labor plus appropriate supplements effective 9/1/51; supplement to Article X, effective 9/1/51 and supplement to Article N, effective January 1, 1953.

3. Agreement and declaration of trust:

(a) Welfare Trust Fund, dated 2/1/51—Waiters and Waitresses Local 301.

(b) Catering Welfare Fund—Waiters and Waitresses Local 301, dated 3/1/54.

4. Agreement and declaration of trust for the chefs, cooks, pastry workers and assistants, Local 111—Welfare Plan, dated 12/13/51.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ LOUIS C. BECHTLE,
Assistant United States Attorney.

/s/ LOUIS N. WILDERMAN,
WILDERMAN and MARKOWITZ,
ESQUIRES,
Attorneys for the Union.

Approved & Ordered Filed
this 3rd day of August, 1957.

/s/ Geo. A. Welsh,
Judge.
United States District Court.

[fol. 47] • • •

[fol. 48] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12323

In the Matter of
EMBASSY RESTAURANT, INC.
Bankrupt
UNITED STATES OF AMERICA
Appellant

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

PETITION FOR LEAVE TO INTERVENE, FILE A BRIEF AS AMICUS
CURIAE AND PRESENT ORAL ARGUMENT—
Filed October 14, 1957

To the Honorable, the Judges of said Court:

The petition of the Philadelphia Joint Board, Amalgamated Clothing Workers of America represents that:

1. Your petitioner is a labor union with its principal office at 2115 South Street, Philadelphia, Pennsylvania.

2. On behalf of the members of said union, your petitioner has duly filed proofs of claim in Padi Clothes, No. 24648, and S. Wachtel & Sons, No. 24582.

3. Said proofs of claim involved a claim by your petitioner for social benefits, constituting a part of the wages due to employees of each of the bankrupt.

4. In the aforesaid cases, the learned Referee has ruled that the determination of the matter is similar to

[File endorsement omitted]

[fol. 49] the above captioned case, in which his honor Judge Welsh of the U. S. District Court for the Eastern District of Pennsylvania has ruled in favor of the said claims.

5. Your petitioner is interested in the subject matter of the instant appeal because of its financial concern in the result of the instant decision, inasmuch as it will control the pending aforementioned two bankruptcy cases.

6. Your petitioner is also interested in the outcome of the above captioned case because of its great concern for employees generally, whom your petitioner feels are entitled to fringe benefits as a portion of their wages due and payable to them, even though said fringe benefits are paid by the employer directly to trustees for sickness and accident funds.

7. Your petitioner has communicated with Harold K. Wood, United States Attorney, counsel for the Appellant United States, Nathan L. Miller, Esquire, counsel for the Appellee Trustee, and Richard H. Markowitz, Esquire, counsel for the Appellee local unions, and subject to the decision of this Honorable Court, each has consented to the filing of a brief Amicus Curiae and the presentation of supporting oral argument by your petitioner.

WHEREFORE, your petitioner prays:

(a). That your Honorable Court permit the petitioner to intervene, as Amicus Curiae, in the above matter; and

(b). That it be permitted to file a brief Amicus Curiae in support of the decision of the lower court within such time as may seem fit to this Honorable Court, and be orally heard in its support.

AND YOUR PETITIONER will ever pray, etc.

MARKOVITZ, STERN & SHUSTERMAN

By

JEROME L. MARKOVITZ, Attorney
for Philadelphia Joint Board,
Amalgamated Clothing Workers
of America

DATED: October 3, 1957

[fol. 50-52] • • •

[fol. 53] UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter of EMBASSY RESTAURANT, INC.,
Bankrupt

UNITED STATES OF AMERICA,
Appellant

ORDER GRANTING PETITION TO APPEAR AS AMICUS CURIAE,
ETC.—October 9, 1957

Present: BIGGS, *Chief Judge* and MARIS and KALODNER,
Circuit Judges

AND NOW, to wit, this 9th day of October, 1957, the prayer of the petition of Philadelphia Joint Board, Amalgamated Clothing Workers of America, to appear as amicus curiae and to file a brief in that capacity and to participate in the oral argument, be and the same hereby is granted.

By the Court

/s/ BIGGS
Chief Judge

[File endorsement omitted]

[fol. 54-58] • • •

[fol. 59] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter of
EMBASSY RESTAURANT, INC.,
Bankrupt
UNITED STATES OF AMERICA,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 8, 1958

Before MARIS, McLAUGHLIN and STALEY, *Circuit Judges*.

OPINION OF THE COURT—Filed April 16, 1958

By STALEY, *Circuit Judge*.

The achievement of complete economic security for industrial workers is the ultimate aspiration of the American labor movement. One method of attaining a measure of this security is the union welfare fund maintained to provide employees with life insurance, hospital and surgical benefit, sick pay, and other advantages. Under virtually all arrangements for a welfare fund, the collective bargaining agreement obligates the employer to contribute a certain sum of money periodically to the fund. Whether these employer contributions are entitled to preference under Section 64(a)(2) of the Bankruptcy Act as "wages * * * due to workmen" is the inquiry presented on this appeal.

[fol. 60] The facts are not disputed. A collective bargaining agreement was entered into by the employer and the union on March 21, 1951. After recognizing the union as the exclusive bargaining agent, the agreement dealt with the accustomed provisions relating to discharge, lay-offs, seniority, vacations, hours, wages, holidays, and other employment conditions. It contained also provisions for sick leave with pay.

On September 1, 1951, the bargaining agreement was amended to render ineffective the sick leave benefits as to certain types of employees. In this supplemental agreement, the employer agreed to pay a certain monthly sum into the union welfare fund for each member of the union in its employ.

On July 1, 1956, another collective bargaining agreement was executed providing that the employer pay into the welfare fund monthly the sum of \$8.00 for each of its employees who are union members. This was the agreement in effect on the date the employer was adjudged a bankrupt.

A written Agreement and Declaration of Trust, dated December 13, 1951, outlined the administration of the union welfare fund.¹ It provided generally for employee welfare benefits and authorized the trustees to file claims for priority of payment of the employer's contribution to the fund in any proceeding involving an insolvent employer. Finally, it specified the application of Pennsylvania law to any questions involving the trust's validity or administration.

The trustees of the welfare fund filed proofs of claim in the employer's bankruptcy proceeding seeking priority as wage claimants for the unpaid employer contributions to the fund which had accrued in the three months prior to bankruptcy. In the same proceeding, the United States filed a lien claim for unpaid taxes. The referee denied the unpaid employer contributions to the welfare fund the [fol. 61] status of wages within Section 64(a)(2), and relegated the amounts to the status of payments due unsecured creditors. The district court vacated the ref-

¹ There are two trust funds involved in this case, but because the facts of each are the same, we treat them as one.

eree's order and granted wage priority to the employer contributions. 154 F. Supp. 141 (E.D.Pa. 1957). The appeal of the United States followed.

The Chandler Act provides in Section 64(a), 11 U.S.C. § 104(a), for debts which have priority over general unsecured claims, and designates the order of payment, so far as is relevant here, as follows:

"* * * (2) wages not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *."

It is undisputed that the amounts of unpaid employer contributions do not exceed \$600 to each claimant and that the sums were earned within three months of bankruptcy. The narrow issue remaining for determination by this court is whether the employer's payments to a union welfare fund pursuant to a collective bargaining agreement are "wages * * * due to workmen" within the purview of Section 64(a)(2).

The resolution of this precise issue has met with a diversity of judicial opinion in the federal courts. The Second Circuit has dealt with the problem in *Local 140 Security Fund v. Hack*, 242 F.2d 375, cert. denied, 355 U.S. 833 (1957), where the employer contributions to the fund there involved were denied the status of wage claims. The court decided that if the term "wages" was to be enlarged beyond its normal definition, this was a legislative and not judicial function. The concurring opinion observes that [fol. 62] the fund was not a "workman" within the meaning of Section 64(a)(2). A district court in California arrived at an opposite decision in the case of *In re Otto*, 146 F. Supp. 786 (S.D.Cal. 1956). There it was held that employer contributions to a welfare fund represented merely another method of computing wages and should therefore be given the wage priority provided for in Section 64(a)(2).

In our own circuit, two district courts have taken opposite stands. The district court in the present case followed the rationale and conclusions of the Otto case, while the district court for the District of New Jersey chose to follow the rule of the Second Circuit in the Hack case. *In re Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (1957).

Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L. J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages.² For this [fol. 63] reason we are constrained to disagree with the view of the Second Circuit in the Hack decision and to affirm the decision of the district court here.

² The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain collectively with respect to "rates of pay, *wages*, hours of employment, or other conditions of employment." 29 U.S.C. §§ 158(a)(5) and 159(a). It has been held that since the benefits of pension and insurance plans are within the scope of the term "wages" the plans are proper subjects of collective bargaining. In the case of *Inland Steel Co. v. N.L.R.B.*, 170 F.2d 247, 251 (C.A. 7, 1948), cert. denied, 336 U.S. 960 (1949), the court quoted from the Board's opinion with approval:

"With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. * * * Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected."

See also *N.L.R.B. v. Black-Clawson Co.*, 210 F.2d 523 (C.A. 6, 1954); *W. W. Cross & Co. v. N.L.R.B.*, 174 F.2d 875 (C.A. 1, 1949).

Since the opinion in the Hack case was rendered, the Supreme Court has expressed its view of the relationships created by the union welfare funds and the character of the employer contributions to such funds. In *United States v. Carter*, 353 U.S. 210 (1957), the trustees of a welfare fund sued the employer and his surety to recover unpaid contributions, the action being brought pursuant to the Miller Act, 40 U.S.C. §§ 270a and 270b. That statute requires that a payment bond be furnished by a contractor working on the construction of federal public buildings, and provides that "Every person who has furnished labor * * * and who has not been paid in full therefor * * * shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *." 40 U.S.C. § 270b(a). The Supreme Court there was confronted with the issues of whether the trustees of the fund could sue as a "person who has furnished labor" and whether the unpaid employer contributions were "sums justly due him." The Court permitted the action and its unanimous opinion bears persuasively on the case here for decision.

The bargaining agreement in the Carter case was similar to the agreement in this case, except that the employer was to pay into the welfare fund 7½ cents for each employee hour worked. The government suggests that when the welfare fund contributions in bargaining agreements are measured by a percentage of the wage earned there exists a basis for distinguishing such an arrangement from the situation where the employer pays a flat monthly sum for every employee. This seems to urge a distinction analogous to the difference between a wage and a salary; Section 64(a)(2) does not make that distinction, and neither do we. The Supreme Court in the Carter case found it unnecessary to decide whether employer contributions to the welfare fund were technically wages as [fol. 64] signed by the employees. It did decide that the trustees could sue on behalf of the employees to protect the employees' rights. The Court then made the following particularly relevant observation, 353 U.S. at page 220:

"* * * the trustees of the fund have an even better right to sue on the bond than does the usual assignee

since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, *these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash.*" [Emphasis supplied.]

Like Section 64(a)(2) of the Chandler Act, the Miller Act sought to protect employees by guaranteeing to them the wages they have earned. We see no reason to treat employer contributions in one way under the Miller Act and in another under the Chandler Act.

The decision of the district Court will be affirmed.

[fol. 65] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter of EMBASSY RESTAURANT, INC.,
Bankrupt

UNITED STATES OF AMERICA,
Appellant

Philadelphia Joint Board, Amalgamated Clothing
Workers of America, *Intervenor*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, McLAUGHLIN and STALEY, *Circuit Judges.*

JUDGMENT—dated April 16, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 9, 1957 of the said District Court in this case be, and the same is hereby affirmed.

April 16, 1958

[File endorsement omitted]

[fol. 66-68] * * *

* * *

[fol. 69] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 70] SUPREME COURT OF THE
UNITED STATES

No. 174, October Term, 1958

UNITED STATES OF AMERICA, PETITIONER

VS.

EMBASSY RESTAURANT, INC., ET AL.

ORDER ALLOWING CERTIORARI. October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.